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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6401

JOHN YOUNG

Petitioner,

vs.

WALTER B. ZANT, Warden
Georgia Diagnostic and Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-

JOHN YOUNG,

Petitioner,

vs.

WALTER B. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Petitioner prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia, entered on November 17, 1980. Application for certificate of probable cause to appeal Petitioner's motion for reconsideration were denied by the Supreme Court of Georgia on January 27, 1981.

CITATIONS TO OPINION BELOW

The order of the Georgia Supreme Court and the unreported opinion of the Superior Court of Butts County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Butts County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was finally denied January 27, 1981. Pursuant to Rule 20 of the Rules of the Supreme Court the time for this petition runs

from the denial of review issued by the Georgia Supreme Court January 27, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involved the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involved the following provisions which are set out in Appendix C hereto:

Georgia Code Ann. § 24-4526

Georgia Code Ann. § 50-127

Georgia Code Ann. § 26-3102

QUESTIONS PRESENTED

1.

Whether Petitioner was denied his right to effective assistance of counsel at his trial as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2.

Whether Petitioner was denied his right to due process of law, equal protection of the law, meaningful access to the Courts and compulsory process as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States by the denial by the state habeas corpus court of Petitioner's motion for funds for expert assistance.

HOW THE ISSUES WERE RAISED BELOW

1.

Petitioner's petition for writ of habeas corpus raised the issue of the effective assistance of Petitioner's trial counsel. The habeas corpus court found this allegation to be without merit. The constitutional issue was again raised on appeal to the Supreme Court of Georgia which affirmed the judgment of the state habeas corpus court.

Prior to the hearing on Petitioner's state petition for writ of habeas corpus, Petitioner moved the habeas corpus court to provide necessary funds for expert assistance, including an investigator. The court denied the motion specifically stating that it had no authority to grant such a motion and would have no funds to make available if the motion were granted. The constitutional issues were raised on appeal to the Supreme Court of Georgia which affirmed the judgment of the habeas corpus court.

STATEMENT OF THE CASE

On January 5, 1976, Petitioner was convicted in the Superior Court of Bibb County, Georgia, of murder and was sentenced to death.

The conviction and sentence were affirmed by the Supreme Court of Georgia in Young v. State, 239 Ga. 53, May 12, 1977. Petitioner filed a petition for a writ of certiorari in the United States Supreme Court which was denied on December 12, 1977, and petition for rehearing was denied in January, 1978.

On August 6, 1980, a petition for a writ of habeas corpus was filed in the Superior Court of Butts County, Georgia. Included in the petition was an allegation that Petitioner was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel due to his trial counsel's failure to adequately prepare and present his defense because his trial counsel was under the influence of illegal drugs during his trial.

During the hearing on Petitioner's habeas corpus petition, Petitioner submitted evidence which showed that his trial counsel, a Mr. Charles Marchman, was convicted in Federal District Court for the Middle District of Georgia, pursuant to a plea of guilty, of possession of illegal drugs,

after Petitioner's trial. Also submitted was a portion of a transcript of another state habeas corpus hearing in a separate case where Petitioner's trial counsel testified under oath that his worst periods of drug abuse problems occurred during the period Petitioner was tried. (Habeas transcript, p. 91-92).

Additionally, Petitioner submitted an affidavit, pursuant to Georgia Code Ann. §50-127(7)(c) as evidence in his state habeas petition. The affidavit showed that Petitioner had given his trial counsel the names of several witnesses who he claimed could have testified to his claim of alibi, but that the witnesses were not contacted by his attorney Mr. Marchman. The affidavit also stated that Petitioner had seen Mr. Marchman taking drugs during his trial. (See Appendix E).

Prior to his state habeas corpus hearing Petitioner filed a motion for funds requesting funds for expert assistance. Among other requests, Petitioner requested funds to procure the services of an investigator to investigate his claims, including his claim that witnesses were available to testify on Petitioner's behalf. The motion was denied by the habeas court which found that it had no authority to authorize the granting of funds.

The state habeas court denied the Petitioner on November 17, 1980.

On December 17, 1980 an Application for Certificate of Probable Cause was filed in the Supreme Court of Georgia. The Application was denied and Petitioner filed a motion for reconsideration which was denied on January 27, 1981.

REASONS FOR GRANTING THE WRIT

1. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

TO THE CONSTITUTION OF THE UNITED STATES.

Since Powell v. Alabama, 287 U.S. 45 (1932), and Gideon v. Wainwright, 372 U.S. 335 (1963), it has been firmly established that a defendant charged in state court with a serious crime has a constitutional right under the Sixth Amendment and the due process clause of the Fourteenth Amendment to the "Assistance of Counsel for his defense." This right rests not simply upon commencement of the criminal trial, but at the very outset of criminal proceedings. Powell, supra, 287 U.S. 45, 57. It is not fulfilled merely by the appointment of an attorney or the presence of an attorney at one's side: "Despite there being perhaps some salutary effect from the mere presence of a competent attorney available to a defendant in a criminal proceeding, physical presence alone fails to satisfy the mandate of the Sixth Amendment." United States v. Woods, 487 F.2d. 1219 (5th Cir., 1973). Rather, the Sixth Amendment guarantee is satisfied only when an accused is provided "effective counsel" -- that is, "counsel reasonably likely to render, and rendering, reasonably effective assistance" [emphasis in original]. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir., 1960), modified on other grounds and affirmed en banc, 289 F.2d. 928 (5th Cir., 1961), cert. den., 368 U.S. 877 (1961).

The guarantee of counsel "reasonably likely to render and rendering effective assistance" (the "MacKenna standard") has been reaffirmed so consistently and so many times in the Fifth Circuit that it has become the idiomatic formulation of the Sixth Amendment standard. See, e.g., Easter v. Estelle, 609 F.2d. 756, 759 (5th Cir., 1980); Fitzgerald v. Estelle, 505 F.2d. 1334, 1338 (5th Cir., 1974), cert. den. 422 U.S. 1011 (1975); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir., 1974).

Whenever a person has been convicted of a capital offense, the conduct of his counsel must be strictly scrutinized. Smotherman v. Beto, 276 F.Supp. 579, 586 (N.D. Tex., 1967).

This is necessitated by the understanding, expressed by the United States Supreme Court in Gardner v. Florida, 430 U.S. 349 (1977), that death differs from other forms of punishment:

> "From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reasons rather than caprice or emotion." 430 U.S. 349, 357-358.

Effective assistance of counsel in a capital case must be assessed with respect to two proceedings which together comprise the defendant's "trial". In the wake of Furman v. Georgia, 408 U.S. 238 (1972), death penalty statutes in Georgia and other states were modified in order to fashion a proceeding that was intended to provide statutorily guided discretion in capital sentencing. Ga. Code Ann. § 26-3102.

For assistance of counsel to be effective in a capital case, it must be demonstrably effective in both the guilt/innocence phase trial and the sentencing phase trial. The quality of the representation afforded during the penalty stage of Petitioner's trial must be considered in the light of the United States Supreme Court's holding "that in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Gregg v. Georgia, 428 U.S. 153, 189 n. 38 (1976) [emphasis added].

This Court has explained minimum requirements for the fair determination of sentence in Woodson v. North Carolina, 428 U.S. 280, 304 (1976):

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> While the practice of individualizing sentencing determination generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect of humanity underlying the Eighth Amendment [citation omitted] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

See, also, Lockett v. Ohio, 438 U.S. 586 (1978). The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel. A substantial failure to obtain and present such information plainly constitutes ineffective assistance of counsel. See, Mason v. Balkcom, 531 F.2d. 717, 724 (5th Cir., 1976); United States v. Pinkney, 551 F.2d. 1241, 1248 (D.C. Cir., 1976).

Even in non-capital cases, counsel has a clearly and universally recognized obligation to present to the sentencing authority evidence of all relevant circumstances of the background and character of the defendant, and a failure to meet this obligation jeopardizes a defendant's Sixth Amendment rights.

Counsel is ineffective, furthermore, "if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d. 1214, 2127 (5th Cir.,

1979). It is the duty of counsel to interview potential witnesses and to make an independent examination of the factual circumstances and law involved. United States v. Johnson, 615 F.2d. 1125 (5th Cir., 1980); Rummel v. Estelle, 590 F.2d. 103 (5th Cir.), cert. granted, 441 U.S. 960 (1979).

Under far less egregious circumstances, the Supreme Court and Fifth Circuit have stated that where any attorney puts on what amounts to no defense at all, "we do not stop to determine whether prejudice resulted." Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Davis v. Alabama, 596 F.2d. at 1221-22; see, Passmore v. Estelle, 607 F.2d. 662, 664 (5th Cir.), modifying 594 F.2d. 115 (5th Cir., 1979).

REASONS FOR GRANTING THE WRIT

2. PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, MEANINGFUL ACCESS TO THE COURTS, AND COMPULSORY PROCESS AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE DENIAL BY THE STATE HABEAS CORPUS COURT OF PETITIONER'S MOTION FOR FUNDS FOR EXPERT ASSISTANCE.

It is "established beyond a reasonable doubt that prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821 (1977). This right, which insures that incarcerated persons have a fair opportunity to present their claims to the courts, has been recognized by this court in a number of decisions which have struck down procedures effectively limiting a prisoner's chance to have his claims heard. See Ex parte Hull, 312 U.S. 546 (1941); Griffin v. Illinois, 351 U.S. 12 (1956); Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961); Douglas v. California, 372 U.S. 358 (1963); Johnson v. Avery, 393 U.S. 483 (1969); Procunier v. Martinez, 416 U.S. 396 (1974); Wolff v. McDonnell, 418 U.S. 539 (1974); Bounds v. Smith, supra.

This right of access has two essential components. The first is that barriers which restrict a prisoner's effective preparation of his constitutional claims must be removed. Thus, for example, in Johnson v. Avery, supra, this Court struck down a regulation prohibiting prisoners from assisting each other with habeas corpus applications

and other legal matters. In Procunier v. Martinez, supra, this Court invalidated a prison regulation prohibiting the use of law students and legal paraprofessionals by attorneys to interview prisoners. "Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Id. at 419. And in Bounds v. Smith, 430 U.S. 817 (1977), the state was required either to provide inmates with law libraries or alternatively to provide professional or quasi-professional legal assistance for the research and preparation of petitions in order to give prisoners meaningful access to the courts.

It is not enough, however, that barriers to preparation be removed or that an inmate have a formal right to file pleadings and papers. The second component of the right of access is that the access afforded a prisoner must be meaningful. If a particular instrument or means of assistance is necessary to make the legal proceeding meaningful, moreover, this instrument may not be denied to prisoners simply because they are without the financial means to pay for it. For "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." Roberts v. LaVallee, 389 U.S. 40, 42 (1967). The state is required to make available the "basic tools of an adequate defense or appeal," Britt v. North Carolina, 404 U.S. 226, 227 (1971), to those incarcerated persons unable to pay. For example, in Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court of the United States held that because a defendant could not obtain an "adequate and effective appellate review" without a trial transcript, the state must provide trial records to

inmates unable to buy them. In Douglas v. California, supra, this Court held that counsel was essential for an inmate to have a meaningful appeal from his convictions and must therefore be appointed for those prisoners unable to pay. Further, an indigent defendant may not be forced to pay a filing fee as a prerequisite for an appeal, Burns v. Ohio, 360 US 252 1959; Douglas v. Green, 363 U.S. 192 (1960) or for a habeas corpus petition, Smith v. Bennett, 365 U.S. 708 (1961). See also Mayer v. City of Chicago, 404 U.S. 189 (1971); Williams v. City of Oklahoma City, 395 U.S. 458 (1969); Rinalidi v. Yeager, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington Prison Board of Prison Terms and Parole, 357 U.S. 214 (1958).

Under these decisions the state is required "to shoulder affirmative obligations" so that all prisoners are afforded a meaningful opportunity to present their claims. Bounds v. Smith, supra. "The right of access to the courts ...assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell, supra at 579.

Failure in the present case to provide appellee with funds for expert assistance directly afforded both components of the constitutional right of access to the courts, for it created a de facto barrier to Petitioner's assertion of his constitutional claims and renders meaningless the formal access afforded him.

The record is unchallenged that Petitioner himself is presently indigent. John Young clearly is incapable of defending himself against capital charges.

Unless he is afforded "the guiding hand of counsel," Powell v. Alabama, supra at 69, to press his state habeas

corpus claims, appellee faces what amount to an impenetrable barrier to relief.

The constitutional right of access to the courts applies not only at trial and on direct appeal but during post-conviction proceedings as well.

Whatever the constitutional obligation of a state might be to provide post-conviction remedies to state prisoners, it is clear that once a system of post-conviction relief has been adopted, it must be administered to provide a full and fair hearing to state prisoners.

This Court in an extended line of cases, has reversed and remanded state court decisions in which prisoners' post conviction claims had been rejected without such a hearing. See Pyle v. Kansas, 317 U.S. 213 (1942); Pennsylvania ex rel. Hermann v. Claudy, 350 U.S. 116 (1956); Sublett v. Adams, 362 U.S. 143 (1960); Wilde v. Wyoming, 360 U.S. 607 (1960); McNeal v. Culver, 365 U.S. 109 (1961); Bushnell v. Ellis, 366 U.S. 418 (1961). As Mr. Justice Powell recently reminded the state courts in Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (concurring opinion): "It is the solemn duty of...(state) courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law." See also, Stone v. Powell, 428 U.S. 468, 495 n. 35 (1976); Case v. Nebraska, 381 U.S. 336, 344-45 (1965) (Brennan, J. concurring).

Further, access to full and fair post-conviction procedures cannot be limited by economic barriers that have no rational relationship to the merits of the legal claims sought to be baised. Discriminations "based upon indigency alone," Lane v. Brown, 372 U.S. 477, 485 (1963) are impermissible. Eskridge v. Washington State Board of Prison Terms and Paroles, supra; Ross v. Schneckloth, 357 U.S. 575 (1958);

McCrary v. Indiana, 354 U.S. 277 (1960); Smith v. Bennett, supra; Long v. District Court of Iowa, 385 U.S. 192 (1966); Gardner v. California, 393 U.S. 483 (1969).

The Court, in Johnson v. Avery, supra, Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal.), aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971) and in Bounds v. Smith, supra, has established irrefutably that "for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than a formality." Johnson v. Avery, 393 U.S. at 486. In striking down the State of Tennessee's prison regulation prohibiting its inmates from assisting one another in the filing of state or federal post-conviction writs, the Court in Johnson held that the impact of the State's regulation was to unconstitutionally forbi(d) illiterate or poorly educated prisoners to file habeas corpus petitions." 393 U.S. at 487. "Johnson v. Avery...makes it clear that provision must be made to insure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the court." Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal.) aff'd. sub. nom. Younger v. Gilmore, 404 U.S. 15 (1971).

The importance of meaningful access to post-conviction proceedings was underscored by this Court in Bounds v. Smith, supra, where the Court declared that such prisoner petitions "are the first line of defense against constitutional violations. The need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review." Id. at 827-28.

Any distinction of habeas corpus as a "civil" rather than a "criminal" proceeding is artificial and cannot act to deprive appellee the assistance of counsel.

The Georgia habeas corpus procedure is a procedure that appellee must utilize and complete before he can petition in a United States District Court for a writ of habeas corpus.

The procedure in a United States District Court is set forth in a law enacted by Congress, 28 U.S.C. §2254, which provides:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure the question presented."

The state habeas corpus procedure may finally determine Fourth Amendment constitutional claims, Stone v. Powell, supra, and may very well be determinative of and foreclose consideration of other substantial issues in the federal proceeding because "a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction...shall be presumed to be correct..." in the federal proceeding. 28 U.S.C. § 2254 (d).

The function of the Georgia habeas corpus procedure as a means of determining constitutional claims in criminal cases is made clear by the Legislature's statement of legislative intent included with 1967 Ga. Laws, p. 835, et. seq., a complete revision of the habeas corpus statute:

> "Section 1. Statement of Legislative Intent and Purpose.
> The General Assembly finds that expansion of the scope of habeas corpus in federal court by

> decisions of the United States Supreme Court, together with other decisions of said court (a) substantially curtailing the doctrine of waiver of constitutional rights by an accused and (b) limiting the requirement of exhaustion of state remedies to those currently available, have resulted in an increasingly larger number of state court convictions being collaterally attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by courts of this State, that such increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights, with a resultant deterioration of the federal system and federal-state relations; that to alleviate said problems, it is necessary that the scope of state habeas corpus be expanded and the state doctrine of waiver of rights modified. The General Assembly further finds that expansion of state habeas corpus to include many sharply-contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases."

The requirement that access to the courts be meaningful takes on special significance in the context of an indigent person who has been sentenced to death. In death cases, courts must be "particularly sensitive to see that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976). Indeed, when a person's life is at stake, higher standards of regularity and fairness are required. The Supreme Court has consistently held that constitutional protections are particularly exacting in death cases. See, e.g., Powell v. Alabama, 287 U.S. 45, 71-72 (1932); Stein v. New York, 346 U.S. 156, 196 (1953); Williams v. Georgia, 349 U.S. 375, 391 (1955); Reid v. Covert, 354 U.S. 1, 45-46 (1957) (concurring opinion of Frankfurter, J.); Id. at 77 (concurring opinion of Harlan, J.).

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that

> qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Woodson v. North Carolina, 428 U.S. at 305 (1976). See also Gardner v. Florida, 430 U.S. at 357-58 (1977).

The State of Georgia's obligation to ensure meaningful access to the state habeas corpus court must be evaluated in terms of the more stringent safeguards demanded when the state seeks the death penalty against a person.

Furthermore, without necessary funds for the assistance of an investigator Petitioner was unable to exercise his right to locate and subpoena witnesses in his favor. "The right to offer the testimony of witnesses and to compel their attendance if necessary...is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). See also, Webb v. Texas, 409 U.S. 95 (1972).

As this Court has stated concerning the companion Sixth Amendment right to confront witnesses, its denial or significant deminution calls in to question the ultimate integrity of the fact-finding process and requires that any competing state interest be closely examined. See, e.g. Barker v. Page, 390 U.S. 719 (1968); Burger v. California, 393 U.S. 314 (1969). The only state interest which can be offered by the State of Georgia to justify the limitations on funds for expert assistance is the lessening of costs.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County.

RESPECTFULLY SUBMITTED,

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JOHN YOUNG,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	NO. 4745
	:	
WALTER ZANT,	:	
SUPERINTENDENT	:	
GEORGIA DIAGNOSTIC	:	
AND CLASSIFICATION	:	
CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus Petition challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Bibb County, Georgia. He was convicted of three counts of murder and sentenced to death by electrocution. His conviction and sentence were affirmed by the Supreme Court of Georgia. Young v. State, 239 Ga. 53 (1977). Certiorari was denied by the United States Supreme Court on December 12, 1977. The Petition for Rehearing was also denied in January, 1978.

Although this Petition asserts twenty-five counts, evidence and argument were presented on only two counts. The Court will address these two contentions, deeming the other unsupported issues of the Petition to be waived and without merit.

The record in this habeas consists of the record and transcript of Petitioner's trial; transcript and record of the pre-trial hearing; the transcript and record of the plea of insanity; the transcript and record of the motion for new trial; and the record and transcript of this habeas proceeding.

1.

Petitioner contends that his Eighth and Fourteenth Amendment rights were violated by the trial court's exclusion of the psychiatrist's recommendation of rehabilitation during the penalty phase of the trial.

FINDINGS OF FACT

The Petitioner called as a witness in the penalty stage of the trial, Dr. Bosch, a psychiatrist employed by Central State Hospital, Milledgeville, Georgia. The trial court excluded Dr. Bosch's testimony as to his recommendation that the Petitioner be allowed to be rehabilitated. (Trial Transcript pp. 699, 700).

CONCLUSIONS OF LAW

The exclusion of this testimony did not violate Petitioner's Eighth and Fourteenth Amendment Rights. The United States Supreme Court in Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d. 738, 99 S.Ct. 2150 (1979), held that to exclude hearsay evidence at the penalty stage violates the Due Process Clause of the Fourteenth

Amendment but only where the excluded testimony is highly relevant to a critical issue in the punishment phase of the trial and substantial reasons exist to assume its reliability. The testimony of Dr. Bosch that he would recommend a rehabilitative program for Petitioner was not "highly relevant" to any critical issue at the penalty stage.

Dr. Bosch was allowed to testify as to Petitioner's background and mental state; however, his proposed treatment of the Petitioner would not be a mitigating factor for the jury to consider. The exclusion of this opinion testimony did not violate the Due Process Clause of the Fourteenth Amendment nor did it render the imposition of the death penalty arbitrary or capricious in violation of the Eighth Amendment.

This contention is without merit.

2.

Petitioner contends that his Sixth Amendment Right to counsel was violated because his trial counsel offered ineffective assistance in the defense of his case.

FINDINGS OF FACT

The Supreme Court of Georgia ruled directly on this issue in the direct appeal of Petitioner's conviction. See Young v. State, 239 Ga. 53, 60 (1977). The relevant portion of that opinion is as follows:

"...7. The seventh enumeration of error alleges he was denied

a fair trial inasmuch as he did not have effective assistance of counsel in the trial of the case.

Appellant's counsel at trial filed innumerable motions and special pleas prior to trial and ably supported them with argument. During the trial, counsel made additional motions, interposed objections, and conducted a thorough and sifting cross examination of the witnesses called by the state. His trial counsel was a member of the Georgia Bar.

In Pitts v. Glass, 231 Ga. 638, 639 (203 SE2d 515) (1974), this court quoted approvingly from MacKenna v. Ellis, 280 F2d 592, 599 (5th Cir. 1960): 'We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' (Emphasis supplied). Appellant's final enumeration of error is without merit."

Subsequent to Petitioner's trial in Bibb Superior Court, his trial counsel was indicted and convicted for violation of the drug laws. He voluntarily withdrew from the practice of law and is no longer an active member of the State Bar of Georgia.

CONCLUSIONS OF LAW

Petitioner's ineffective assistance of counsel argument has already been decided adversely to him. This habeas court can reach no different conclusion because of the difficulties Petitioner's trial counsel

had with the law at a later time because there has been no showing that the lawyer's drug problems had any effect on the way Petitioner's case was tried. Even if the Court assumes that trial counsel was taking illegal drugs during Petitioner's trial, the result is no different because Petitioner has been unable to show any relationship between his trial and the lawyer's personal problems. The Supreme Court found no Sixth Amendment violation. Nothing has been presented to make that opinion inappropriate.

This contention is without merit.

3.

Petitioner asserts that he cannot present evidence in support of his ineffective assistance claim and other points raised in the Petition because he is indigent and without funds. He filed a Motion asking the Court to make available funds for witness fees, investigation, and for other purposes.

The Court has no authority to grant such a Motion and would have no funds to make available if it did.

The Motion is denied.

JUDGMENT

Upon examination of the issues raised in this habeas corpus petition, the Court concludes that no substantial denial of Petitioner's constitutional rights under either the United States Constitution or the Georgia Constitution has been presented.

A P P E N D I X " A "

Therefore, the writ of habeas corpus is hereby denied.

SO ORDERED, this 17th day of November, 1980.

R. ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

APPENDIX "A"

TR 52

Application No. 1480

JAN 28 1981

GA. CRIMINAL JUSTICE COUNC

SUPREME COURT OF GEORGIA

ATLANTA, January 27, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JOHN YOUNG V. WALTER ZANT, WARDEN

Upon consideration of the Motion for Reconsideration filed in this Application, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

APPENDIX "B"

Application No. 1480

SUPREME COURT OF GEORGIA

ATLANTA, January 12, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JOHN YOUNG V. WALTER B. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby DENIED. All the Justices concur, except Hill, P.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX "B"

GEORGIA CODE PROVISIONS

Georgia Code Annotated Section §24-4526

Appeals of Habeas Corpus After Criminal Convictions

When Applications Granted: An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section §50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court of record.

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

(1) Grounds for writ.--

Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or priviledge which relenquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence showa in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--

The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgment complained of, and clearlyset forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

(3) Jurisdiction and venue.--
The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiaction of habeas corpus actions arising under this section.

(4) Service of the petition.--
Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of thepetition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other guthority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--
Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--
Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.--
(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.
(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.
(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.
(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--
All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--
After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fac t and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of alw shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--
All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be riased by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--
(a) Appeals in habeas corpus cases shall be governed by the Appellante Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now

provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

Georgia Code Annotated Section §26-3102

Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty. (Acts 1968, pp. 1249, 1335; 1969, p. 809; 1973, pp. 159, 170).

A P P E N D I X " C "

FILED at 1:15 P M
APR 29 1976
Janet F. Harris
Deputy Clerk, U. S. District Court
MIDDLE DISTRICT OF GEORGIA

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA)
v.) Criminal No. 76-75-MAC
CHARLES MARCHMAN, JR.) Violation: 21 USC §841

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE

That on or about February 2, 1976 in the Macon Division of the Middle District of Georgia and within the jurisdiction of this Court,

CHARLES MARCHMAN, JR.,

knowingly and intentionally did possess with intent to distribute a non-narcotic controlled substance included in Schedules I through III, inclusive, of Schedules established pursuant to Sections 811 and 812 of Title 21, United States Code, the said CHARLES MARCHMAN, JR not being then and there registered to distribute such controlled substance as is required by Section 822 of Title 21, United States Code, such controlled substance being more particularly described as follows: approximately one (1) pound of a substance containing marihuana; all in violation of 21 United States Code §841.

Assistant United States Attorney

A true and certified copy.
This 2nd day of ... 197...

PLEA

I, CHARLES MARSHMAN, JR.

having been advised of my Constitutional rights, and having had the charges herein stated to me, plead guilty

In Open Court, this 8th day of April, 19 70

Charles Marshman

Thomas J. Phillips, Jr.

APPENDIX "D"

United States of America vs.

United States District Court for

DEFENDANT: CHARLES MARCHMAN, JR.

THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DOCKET NO. CR. NO. 76-75-MAC

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: June DAY: 18 YEAR: 1976

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Thomas J. Phillips, Employed (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, as to Count 1. [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of 21 USC 841 - Possess with intent to distribute marijuana.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

THREE (3) YEARS, on Count 1, or until he is otherwise discharged as provided by law, to be followed by a special parole term of FIVE (5) YEARS, ORDERED FURTHER that defendant shall serve THIRTY (30) DAYS of said sentence, and execution of the remainder of said sentence is hereby suspended and the defendant is placed on probation for a period of FIVE (5) YEARS on Count 1, and the service of said probation sentence is to begin after completion of the thirty (30) day imprisonment portion of this sentence. Service of the THIRTY (30) DAY imprisonment portion of this sentence shall be served in the Bibb County Jail. A special condition of this probation sentence is that defendant will refrain from using any drug that is not given to him by a valid prescription of a licensed physician, and further that defendant will refrain from association with anyone who is now a drug user or has in the past been known to be a drug user.

SPECIAL CONDITIONS OF PROBATION

Filed at 3:30 p.m.
June 25, 1976.
Paul Daniel
Deputy Clerk

A P P E N D I X "D"

ADDITIONAL CONDITIONS OF PROBATION

32

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

A true and certified copy.
This July 2 1976.
WALTER F. DOYLE, Clerk
U.S. Dist. Court, MD Ga.
By: Paul Daniel
Deputy Clerk

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Wilbur D. Owens
WILBUR D. OWENS, JR.

Date June 18, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA) Crim. No. 76-75-Mac.
VS.)
CHARLES MARCHMAN, JR.)

SENTENCING

Hon. Wilbur D. Owens, Jr., United States District Judge

June 18, 1976, Macon, Ga.

APPEARANCES:

For the Defendant: MR. THOMAS PHILLIPS
Attorney at Law
Milledgeville, Georgia

THE COURT: Mr. Phillips, Mr. Marchman, the Court will be pleased to hear from both of you.

MR. PHILLIPS: Thank you, Your Honor.

May it please the Court, may I ask the Court's indulgence in a few remarks on behalf of my client prior to sentencing?

THE COURT: Go right ahead.

MR. PHILLIPS: Thank you, Your Honor. I think that it goes without saying that probably today, June 18, 1976, may be the most crucial day in the life of Charles

MERRY ANN FINCH
UNITED STATES COURT REPORTER

Mr. Phillips:

Marchman, and possibly his son Chuck who is seven years old.

Obviously what happened involving Charles invdved other members of his family, especially his son. But I wanted the Court to be aware, and the Court may already be aware of the punishment Mr. Marchman himself has already imposed upon himself and brought to bear upon himself.

Your Honor may or may not be aware that he has voluntarily closed his law office and law practice. Secondly, he has voluntarily applied to the State Bar of Georgia for a multi-year suspension from the practice of law.

Thirdly, Your Honor, he has voluntarily, if you will, exiled himself from his profession and from the community in which he has practiced in the hopes of not bringing any further publicity or discredit to our profession.

Next, and I know this is embarrassing, but obviously his financial position is such that - is not very good. Again, this is embarrassing to him, he is on the verge, in my opinion, of technical bankruptcy. He has no income.

Furthermore, the embarrassment and the alienation from his profession obviously is one of the most painful experiences of his life, and he has truly suffered and he is going to continue to suffer as this has been a disgrace and a shame to our profession.

Charles is a young man, as Your Honor knows, 29 years of age, and most of his life has been academically and

MERRY ANN FINCH
UNITED STATES COURT REPORTER
P. O. BOX 534, MACON, GEORGIA 31202

Mr. Phillips:

religiously oriented. As Your Honor knows from the probation report, he has been an outstanding student, having graduated in the top five; he has an IQ of 158; his life has been filled with awards and achievements, National Beta Club, etc, and he has been a Boy Scout six years of his life and earned the highest rank of an Eagle Scout, and a Royal Ambassador in the Baptist Church attaining the highest rank there; and attended Sunday School for 15 consecutive years without missing a Sunday.

His relatives, a religious background, his grandfather is 93, and is a second cousin of Mr. Martin, Sr., T. Baldwin Martin, Sr., a Southern Baptist minister. His family, his mother and father are both in the church, both leaders in the church.

His life from the family followed him at Presbyterian College, Augusta College where he was a member of the choir, an academic scholarship, religious oriented,member of the Glee Club, he went to London where they received so many awards, and then as Your Honor knows he went on to Mercer Law School and graduated in 1971.

In reference to his family, Your Honor, Tim just graduated from Carson-Newman, Rick is a senior at Elon College, on the Dean's List, Ben is a sophomore at Western Carolina, and Nancy is in Baptist Retreat, New Mexico. None of the members of this family have any prior record, whatsoever.

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Mr.Phillips:

Charles has been a dedicated lawyer. When I first met Charles in opposition - we opposed each other and we've opposed each other many times, and I have worked with Charles. I guess the best way sometimes to describe a lawyer is look to his peers; look to his brothers and sisters. And if the Court will permit me, just gleaning a few of these comments--

THE COURT: You can say anything you want to, but I have read every letter and every communication about Mr. Marchman that's in the report.

MR. PHILLIPS: Just very briefly, Your Honor, a bright and intelligent young man and extremely competent and capable and dedicated lawyer; a smart, keen, alert and above average attorney in all respects, a man proud of his profession, warm-hearted and generously giving of his time resulting in personal sacrifice to himself, an extremely good father, a man who loves the law and loves the practice of the law, a lot of ability and a lot of energy and a lot of knowledge, a well-manner, courteous gentleman, always courteous and maintained a high degree of ethics. In many cases in Court, and in many cases in court, in every case in a particular court he has vigorously defended his clients and saw to it that every constitutional right of his clients were asserted.

And finally, he has spent immeasurable time in the

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Mr. Phillips:

preparation of his cases and in his conduct, in this particular case that I am mentioning in chambers in court was a credit to his profession.

Your Honor, very briefly those are my remarks. I know Your Honor has the probation report and the letters. We ask the Court for mercy and clemency in this case if at all possible. What may or may not be known by the Court, it seems like he is suffering more recently in spending the last few days with his son camping up in the mountains and someone came around the corner in an automobile and hit them headon and Charles was injured, his head and his back. He is also suffering from peptic ulcers and Bell's palsy, a temporary case of Bell's palsy in his face, and I want the Court to be aware of that.

Of course, Your Honor, the self-imposed punishment, recognizing his wrongs, admitting to this Court, admitting to the brothers of the Bar that he has violated the law that he swore to uphold, he has already been punished. There's no doubt about that, that he has been punished. Of course the greatest punishment, or the punishment that could be inflicted in this case is incarceration, and not only has he taken himself out of his profession but then he would leave our society and leave his son and leave his family.

We ask the Court, in looking at one of the basic tenets of our judicial system, to consider rehabilitation in

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P. O. BOX 534, MACON, GEORGIA 31202

this case.

Judge George Carpenter,Sr., who is now retired, and Your Honor, I am sure has practiced before him over in the Ocmulgee Circuit, in talking about young people and marijuana used to quote Judge John Kennedy in sayin g that sometimes young people either hear the sounds of a different drummer or a distant drummer. And in this case it may be the case - I do not know, Your Honor - except to say that we have admitted to the Court previously about our use of marijuana and our possession of marijuana and that we did intend to give it to another. We have admitted that to the Court.

But in reference to the rehabilitation, we ask the Court to consider an alternative of incarceration, to consider probation in this case, asking the mercy of the Court. He is a first offender. I know it's trite; I know Your Honor has heard this hundreds of times, but we are asking the Court to give him a chance. As Jesus has said so many times in the Bible, so he can have a chance to go and sin no more.

Thank you.

THE COURT: Mr. Marchman?

MR. MARCHMAN: Five years ago, Your Honor, I was admitted to the Bar by Judge Carpenter, Sr.,as Mr. Phillips indicated. At that time I took an oath to uphold certain

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rights and privileges and duties that were imposed upon me as an attorney.

At that time never did I expect to stand before the Bar, before the Court, not as an attorney representing his client, but instead, as a defendant, because I myself had committed a wrong against society. And it has bothered me very much since that time because I have tried throughout the last five years practicing the law and even while I was in law school and before that when I was considering going to law school, and throughout my earlier life in high school and at home I have tried to live a life style which would be a credit to my family, to my friends, to all those around me. I have tried to uphold the integrity that has been placed upon me so many times by the honors and awards that I have received from the time I was just the size of my son here.

I can't give any explanation or answer, it would be nice if I could, to why somewhere along the line I became involved in the use of drugs and why this particular case came about. I have studied my own mind thoroughly, seeking and searching in my heart for some answer. But I can't find one as to why. Instead I have felt a profound sense of loss, loss of integrity, loss of personal reputation, loss of character in my own way because I was trying instead to build these things up rather than to bring them down for anyone.

And losing sight of the goals that we sort of have in

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Mr. Marchman:

our bicentennial year this year of the 200th anniversary of our country of life, liberty and pursuit of happiness, I think I did lose sight of those goals, being perhaps more selfish and concerned about myself rather than the integrity of my profession, the integrity of my clients sometimes. I began last fall feeling these things rather drastically, my father became ill, and I started working with him in his business, and I felt that my method, manner of approach of law practice was very wrong, and sometimes inconsiderate. Yet I wanted to make some changes, and I had a very difficult time making those. So many things had happened over the period, getting a divorce and going into private practice by myself and many other things.

But I lost sight of the goals and objectives. I freely admit that. That's something that no lawyer, no person likes to admit, that he has set a goal for himself that he can't reach. But sometimes you have to sit back and retreat in order to look out again and see the lofty heights that you aspire to and work that much harder. Sometimes you fall stumbling down the mountain. I have fallen. I have fallen down the mountain quite a bit. And what hurts me most is that in the fall, although I have been hurt, I have hurt the people who have loved and cared and been friends with me and for me and to me over these years - my parents, my son, other attorneys, many friends

Mr. Marchman:
that I have had. These people, above all else, I have let down, because I was to be the strong person who could be a strong attorney, standing up and representing them, representing what was right. And I let these people down. Not only did I let myself down, but these other people who mean more.

People in this country make up the nation; they make up the world; and it is their intense feelings and their pride that they have in other people and their personal concern that create our nation, to allow it to go on to have a 200th anniversary.

I am here before the Bar of this Court. I can only ask the Court to do justice. That's what has to be done. I am not above the law. I am a member of the Bar, certainly; but I'm still a human being. But I have erred also. I publicly acknowledge that, and I intend within the next few years to do everything possible, in social organizations or other ways, to not only rehabilitate myself, but to repay the loss of trust and friendship and love that other people have given to me. Sometimes I have thought that it didn't exist, and after this case came about I found just how deeply involved and how much love there was, from fellow members of the Bar, and other people - from total strangers, that I have never met. Many of the things I have done have not been worth the price I have had to pay - the publicity that I have garnered

somtimes has been my own making; sometimes has been something that I didn't really want. It hasn't been worth the price.

I can only now revitalize my life to come back and make myself a stronger attorney, a stronger member of the Bar, and prove the trust that was given to me originally when I was admitted to the Bar, to everyone here. Not only the people here but to the entire sodiety because they deserve my best. I have let them down. And I intend not to do the exact opposite, to give them the very best I have.

MR. MARCHMAN, SR.: Judge, our son has been a good son all through his life. He has been a hard worker; he has helped me out on numerous occasions. He's done a lot of good for his family and a lot of good for his fellow man. And all I can ask for is any clemency you can show us.

THE COURT: Of course, Mr. Marchman, your case obviously is one that has given not only your family but the Court considerable concern. What do we do in this world we live in with a lawyer who has far above average mental capacity, who champions the cause as he is supposed to do in this Court and other courts of those who have been accused of violating the law? But yet who for reasons that really are not apparent lives a totally different life on a personal level. To put it crudely, from what you tell us and what we know about you, it indicates that you really for sometime have chosen to live a lie. You are like a Dr. Jekyll and Mr.

The Court:

Hyde. You come into court defending the law and you go home and violate the law.

Of course your son, who is standing here, probably is not old enough to know much about Court. I have a five-year old and have some appreciation for that. They have to realize that even we daddys mess up and do things wrong. And just like we spank our children even daddys have to be spanked, to put it plainly to a child. And just because you are spanked doesn't mean you are worthless and not capable in the future of doing something that's better.

Now of course while your voluntarily relinquishing your law practice is something that you did, it also is just recognition of the inevitable, because we know - the public may not know - that anybody who is convicted of a felony cannot practice law in this State. The Court is not looking down the road to your returning to the practice of law, because as I understand it, until pardoned for this offense, you cannot practice law. I don't think that's discretionary with the Bar Association or anybody else. I believe you will find that to be a rule in this State.

So from what the Court sees, your plans down the road must be to do something lese other than practice law.

And of course you know it would be totally inconsistent in the court world to punish and admonish average citizens for violating the law and over here, as to those who happen to be

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privileged to practice law, pat them on the back and say don't do it again and just come back and practice law. It just wouldn't be right. Not that we don't have sympathy for a lawyer; we naturally do.

But anyway, this Court's view of the situation is not one that contemplates you returning to the practice of law. I don't think it's realistic that you should. But that decision other than as to this Court is not up to this Court. As far as this Court is concerned, you will not be permitted to practice in it. The State Courts will have to make their own determinations. What we do is not binding on them.

Now the Court is aware of many things, has some feeling for the background of this case, has gone so far as to make every inquiry that could possibly be made and it's all reflected in here. You know, you begin to wonder about the crime of possession of marijuana with the intent to pass it on to others. When we think about that I guess we put at the top of the ladder naturally, as human beings, those who do it for monetary profit. It seems like we have had an awful lot of people in that category. Many of them are not people who have ever used drugs - they don't do anything but obtain it, sell it to those who use them, for money. As you have heard this Judge say, they, to me, are at the bottom of the barrel because they are living off the weaknesses of our fellow

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human beings.

But you know, when better people, like yourself, succumb to using and passing on to others drugs, society doesn't really look at it quite as harshly. But at the same time, isn't that almost as bad, because aren't you, as a lawyer, more intelligent, a person who comes from more advantaged circumstances, really having a greater influence on your fellow man, when you set an example of using drugs yourself and passing them on to others -- you know, when an Eagle Scout says to other children "I use drugs," what do you think that tells them. It would be about like me standing out on the street corner and saying "I am a Judge and I think using marijuana is all right."

Children look up to Eagle Scouts just like society looks up to those to whom they entrust judgeships. They kind of sit back and take a new look at it. While you might sincerely believe that marijuana is not a harmful substance, the fact remains that those to whom we entrust the making of our laws and who represent me and you and your son and your mother and your father have looked into this situation and they have determined that for the present time that it is harmful - they must have some good reasons for it. I don't know anything about it. I hear arguments in Court about whether or not the drug is harmful. I decided a long time ago that I wasn't appointed a Judge to make that decision. I took an oath

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The Court:

to abide by the laws passed by Congress. Congress makes the decision, and whatever they decide it is my duty and my responsibility to carry it out. Supporting their conclusion might be some of the information that has been displayed on the local level over quite a few years - probably some in your childhood received in school. I vividly recall a movie that the Sheriff's Office caused to be shown to civic organizations here in Bibb County. It included interviews with inmates of various Federal drug institutions. They interviewed the inmates who were there on hard drug problems. They did a computer study about it and they asked them what drug did you first get started on, and in the 80 percentile they replied "marijuana." That doesn't prove that marijuana by itself is harmful, but it might possibly indicated to all of us that it does lead to other drug usage and to eventual harm. Maybe that's what Congress had in mind.

Now let's also think about this fine young man that the Court is also very concerned about. What example does it set for this child for you also to be frequently with people who use drugs, and to be using drugs yourself. He can't help but grow up thinking it's all right. He can't help but wonder, well Daddy believes in the law and yet he himself violates the law. We don't give children enough credit for understanding what goes on in this world, understanding what's right and what's wrong. I suggest to you that most children have got a better

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sense of what's right and what's wrong than we adults have, because a child this child's age right quick will tell you "don't mess with drugs." In fact even after cases are over I can go and discuss them with my four children and not tell them what a jury did, and they will analyze it just like that, better than the jury did or I did. They use common sense of everyday things. They are not hung up with adult theories.

What I am saying at such length is that the real problem in your case is that you as one who took an oath to uphold the law, have been violating it yourself. What do we do with people like you? You take people who are uneducated, who are disadvantaged, and we send them to the penitentiary and think nothing about it. All of us have taken that attitude. Take an average burglar, give him 10 or 20 years and you read about it in the paper - got what he deserved. You are a person of exceptional advantage. What do we do about you?

Well if there was any evidence that you had profited monetarily from any of the drugs that you have been involved in, the Court wouldn't hesitate to put you under the penitentiary, to give you exactly what you deserved. And frankly, only the fact that you do not, as far as the Court has seen, seem to have profited monetarily, causing the Court to take a more lenient attitude towards your case. But at the same time, the influence that you have had on others is just something we cannot put up with.

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The Court:

I think there's hope for you down the road, but I think at the same time you need a firm sentence and you need a taste of what it is to serve some time. You need at the age of 29 to know that in spite of your exceptional ability, and the fact that you were an Eagle Scout and come from a good family that you still are subject to the same penalties that all other citizens are subject to. You've got to be taught a lesson, something that you didn't learn before now. Like you have heard me say, the law doesn't let us whip a 29-year old but I suggest again that it ought to. It really would be good if your father were permitted to take you out on the flag-pole and beat the devil out of you, if that would cure the problem. I am not blaming him. We never know what causes children to misbehave. All parents can do is do the best they can. My children might misbehave just like you have. And I might have caused it, unintentionally.

But anyway, with the hope that it is going to teach you a lesson down the road and make you the good citizen that you have not been recently, the Court is going to sentence you on the one count that you have plead guilty to which carries the maximum possible penalty of five years and requires at least two years minimum special parole term, to the custody of the Attorney General for a period of three years, to be followed by a special parole term of five years. I am going to suspend the imposition of all of that penitentiary sentence

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The Court:

except thirty days, and I am going to let you serve that in the Bibb County Jail.

I say I hope that that time will teach you a valuable lesson and will cause you to never again have anything to do with drugs.

Now you will be on probation as far as the suspended sentence for a period of five years. It is a special condition of probation that you will refrain from using any drugs that are not given to you by a valid prescription of a licensed physician - and I man a valid prescription. When a doctor hands you a piece of paper and says this is a prescription, valid within the law as interpreted by the Supreme Court of the United States.

And further, that you will refrain from associating with anyone who is then a drug user, or has in the past been known to be a drug user.

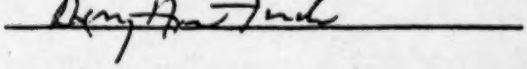
We hope that that will be in your best interest.

* * * *

CERTIFICATE

I, Merry Ann Finch, U.S. Court Reporter, certify that acting in such capacity I reported the sentencing proceeding in the above styled case and the foregoing pages numbered 1 through this page 17 are a true and accurate transcript thereof.

WITNESS my hand, this 8th day of August, 1977.



IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JOHN YOUNG,	)	
Petitioner,	)	
v.	)	HABEAS CORPUS NO. 4745
WALTER B. ZANT, Warden, Georgia Diagnostic and Classification Center,	)	
Respondent	)	
	)	

AFFIDAVIT

Come now John Young, appearing before the undersigned officer authorized to administer oaths in the State of Georgia, and after being duly sworn, swears and affirms as follows:

I am John Young, Petitioner in this habeas corpus action, currently incarcerated in the Georgia Diagnostic and Classification Center under penalty of death imposed by the Superior Court of Bibb County. The things hereto sworn are facts relating to Mr. Charles Marchman's representation of me at trial. He began representing me about one year before trial, although I do not know the exact date when he first came to see me.

-1-

During the early stages of Mr. Marchman's representation of me I requested that he file a motion for speedy trial because I felt if we waited a long time for trial my witnesses would be hard to find. Even though I urged him to do this, he failed to do so and never offered any explanation.

Mr. Marchman failed to appear at a preliminary hearing of some kind before a City Court Judge. I was bound and shackled and the Judge would not allow me to appear and asked where Mr. Marchman was. I was never taken to another preliminary hearing. My next appearance was months later.

-3-

Mr. Marchman did not come talk to me until after I had been in jail five weeks.

-4-

My defense, as I laid out to Mr. Marchman, was that I was at the home of Ms. Gloria Searcy, who lived on Edgewood Avenune in Macon, Georgia on the night these things were supposed to have happened.

-5-

There were several witnesses who could have verified where I was on the evening and late that night and early morning of the day that these things I was accused of happened. To my knowledge, he never attempted to find any of these.

-6-

I gave Marchman information about Ms. Alma Iris, who lived on 2024 Third Street, in Macon, Georgia, and information about how to find her. She was with me on that night. To my knowledge, he never contacted her.

-7-

I told Marchman about Jerome Jackson, who was at the home of Ms. Gloria Searcy on the night these things were supposed to have happened. To my knowledge, he made no effort to contact him.

-8-

I gave Marchman the name of James Ray, who was also at Ms. Searcy's house that night. To my knowledge, he never attempted to find Mr. Ray.

I also told Mr. Marchman about Janice Searcy. She was present with me the night of the incident at the home of Gloria Searcy. To my knowledge, she was never contacted.

-10-

When I asked Marchman about the witnesses, he responded that they could not be found. In particular, he told me that Gloria Searcy could not be found.

-11-

Before trial, Ms. Gloria Searcy visited me in jail. She told me that Marchman had made no effort to contact her.

-12-

I also gave Marchman leads which would lead to these witnesses and help him to find them.

-13-

Marchman told me that he did not believe my account of where I was that night.

-14-

I told Marchman that witnesses could be found at the Adam Lounge who could be helpful. He never contacted any of these witnesses to my knowledge.

-15-

Over the many months that I waited for trial, Mr. Marchman told me he did not believe me and, to my knowledge, never attempted to contact any witnesses.

-16-

At trial I pointed out many elements of the case to which the alibi witnesses could testify; he offered no evidence of any kind on these points.

Marchman told me he knew what the effects of Qualudes felt like and indicated to me he knew about drugs.

-18-

During my trial, I observed Mr. Marchman taking some kind of pills. They were huge grey pills.

-19-

After several visits by Marchman, I observed that Mr. Marchman's actions and traits were like those I had observed in gay (homosexual) people. I asked him if he was gay. He said he was. It was obvious from his feminine traits and actions.

-20-

I pointed out many ways in which Marchman could cross-examine witnesses against me and he refused to do it.

-21-

Marchman refused to cross-examine witnesses which I knew to be presenting false statements and incorrect facts. I told him the specific things about which they were wrong and he refused to ask about these things.

-22-

Marchman refused to cross-examine the fingerpring expert even when I specifically pointed out the inconsistencies in his testimony. He refused to question him.

-23-

The District Attorney made inflammatory and prejudical remarks in the closing argument to which Marchman did not object.

-24-

Marchman failed to object to the District Attorney's misinterpretation of the facts to the jury in the District Attorney's closing arguments.

-25-

Marchman failed to ascertain from the fingerprint expert even where the fingerprint he took came from.

-26-

Sheriff Brown presented a different version of the facts about my arrest from the testimony of other officers. His testimony was stricken and Marchman made no effort to point out the inconsistency to the jury.

-27-

I am convinced that Marchman did not adequately represent me in court.

-28-

Marchman did not investigate my defense, to my knowledge, at all.

x John C. Young

John Young
Petitioner and Affiant
Georgia Diagnostic and
Classification Center

This 6th day of October, 1980.

Sworn to and subscribed to before
me this 6th day of October, 1980.

Ann Scott T. Sevier
NOTARY PUBLIC

My commission expires:
11/9/80

APPENDIX "E"

54

CERTIFICATE OF SERVICE

I, Nelson Jarnagin, hereby certify that I have this day served opposing counsel with a true copy of the fore-going pleading by depositing the same in the United States mail with proper postage annexed thereto and with a proper address of the opposing counsel; or in the alternative by personally delivering a copy of same to opposing counsel.

This 25th day of March, 1981.

Nelson Jarnagin

Nelson Jarnagin
August F. Siemon
ATTORNEYS FOR JOHN YOUNG

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